

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF

NUMBER

**JITNEY-JUNGLE STORES OF
AMERICA, INC. and JJSA
LIQUIDATION TRUST**

**99-17191
SECTION A**

DEBTOR

OAKRIDGE CONSULTING, INC.

ADVERSARY NUMBER

PLAINTIFF

01-1453

V.

PLACID REFINING COMPANY

DEFENDANT

CHAPTER 11

MEMORANDUM OPINION¹

This matter came before the court on November 15, 2004 as a trial on a complaint to avoid and recover preferential transfers filed by Oakridge Consulting, Inc., Liquidation Agent for the Post-confirmation Estate of the

¹ Pursuant to Federal Rule of Civil Procedure 63, which is made applicable to this proceeding by Bankruptcy Rule 9028, this matter is now before Judge Jerry A. Brown. The court certifies that the presiding judge before whom the hearing was held is dead and, therefore, is unable to proceed, that the present judge is familiar with the record, and that the proceeding in this matter may be completed without prejudice to the parties. The court also certifies that the parties did not request that any witnesses be recalled. The court has read the transcript of the testimony and deems it unnecessary to recall any witnesses.

debtor. For the reasons assigned the court finds that the transfers made from the debtor to Placid Refining Company after August 4, 1999 are preferential transfers that can be avoided by the debtor pursuant to 11 U.S.C. §547(b) and can be recovered as such pursuant to 11 U.S.C. §550(a).

I. Facts

Placid Refining Company (“Placid”) was a creditor of Jitney Jungle Stores of America, Inc. and its subsidiary Pump and Save (collectively “the debtor”).

Placid began supplying the debtor with gasoline in 1988. On May 15, 1991, the debtor executed a credit agreement with Placid. Payment was due on the eleventh day after the invoice date, and payment was made by electronic funds transfer (“EFT”) from the debtor’s bank account. The limit of the credit to be extended by Placid to the debtor was \$500,000.

On January 21, 1997, Placid lowered the debtor’s credit limit from \$500,000 to \$300,000. The terms of payment were twelve days from the invoice date, and payments were to be made by EFT.

On March 3, 1999, the debtor executed a new credit agreement because Placid changed its name. The terms and amount of credit did not change.

On August 4, 1999, Placid reduced the debtor's credit limit from \$300,000 to \$125,000. Placid also required the debtor to pay by wire transfer rather than EFT.

On October 5, 1999, Placid reduced the credit limit to \$0. During the 90 days prior to the debtor filing for relief pursuant to Chapter 11 of the United States Bankruptcy Code ("the preference period"), July 14, 1999 to October 12, 1999, the debtor transferred to Placid a total of \$2,575,862.26.²

These transfers to Placid were made for the benefit of Placid.³ The debtor was insolvent at the time the transfers were made.⁴ The transfers allowed Placid to receive more than Placid would have received if the debtor had been liquidated under Chapter 7 of the United States Bankruptcy Code.⁵

² Trial Exhibit Jitney 3, "Joint Stipulations"

³ *Id.*

⁴ *Id.*

⁵ *Id.*

The parties have stipulated that as a result of the application of 11 U.S.C. §547(c)(4) only \$345,286.56 of the payments are not protected by new value provided by Placid.⁶

II. Law and analysis

Preferential transfers that may be avoided by the trustee are defined in 11 USC § 547(b):

- (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor--
 - (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made--
 - (A) on or within 90 days before the date of filing of the petition; or
 - (B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer was an insider; and
 - (5) that enables such creditor to receive more than such creditor would receive if--
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provision of this title.

After stipulations by the parties, only one element of a preferential transfer is in dispute. The parties disagree as to whether some of the

⁶ *Id.*

payments were made “for or on account of an antecedent debt.”⁷ Placid contends that the payments were not on account of an antecedent debt, and therefore, they were not preferential. Even if the court finds the transfers preferential, Placid contends that they were contemporaneous exchanges pursuant to 11 U.S.C. §547(c)(1), and thus, cannot be avoided.

Also, Placid contends that the transfers cannot be avoided as they were made in the ordinary course of business pursuant to 11 U.S.C. §547(c)(2).

The debtor has the burden of proving the avoidability of the transfers under §547(b).⁸ Then, the burden shifts to Placid to prove its defenses under §547(c).⁹

A. Antecedent debt

One element that must be satisfied in order for a transfer to be avoided as preferential is that the transfer must be “for or on account of an antecedent debt owned by the debtor before such transfer was made.”¹⁰

⁷ 11 U.S.C. §547(b)(2)

⁸ 11 U.S.C. §547(g)

⁹ *Id.*

¹⁰ 11 U.S.C. §547(b)(2)

Placid contends that the transfers were not on account of antecedent debt but instead were contemporaneous exchanges.

A debt is antecedent under § 547(b) if the debtor incurs it before making the alleged preferential transfer. *In re Intercontinental Publications*, 131 B.R. 544, 549 (Bankr.D.Conn.1991); *Tidwell v. AmSouth Bank (In re Cavalier Homes)*, 102 B.R. 878, 885 (Bankr.M.D.Ga.1989); 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 547.05 (15th ed. 1995). Our focus, therefore, is on the date the debt was incurred and the date the transfer occurred.¹¹

There are three dates on which the debtor paid for the exact same amount of product that it received: August 20, 1999, September 2, 1999, and September 27, 1999.¹² Because the debts were incurred on the same day of the transfers, the court finds that the transfers made on August 20, 1999, September 2, 1999, and September 27, 1999 were not on account of antecedent debts. Therefore, the transfers on those dates cannot be avoided as preferential transfers. The court finds that the other transfers within the preference period were on account of antecedent debts as the debts were incurred before the date of the transfers.

¹¹ *In re Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1996).

¹² Pleading 28 (Transcript), pp. 9 and 10

B. Contemporaneous exchanges

Placid contends that the payments during the preference period are not voidable because they were contemporaneous exchanges.

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;¹³

The purpose of the contemporaneous exchange for new value defense is to protect transactions that do not result in a diminution of the bankruptcy estate.¹⁴ A transfer does not diminish the estate if the estate receives "new value" on account of and equal to the amount of the transfer.¹⁵

The "contemporaneous exchange" exception has three basic requirements:

(1) the creditor must have extended new value to the debtor in exchange for the payment or transfer;

¹³ 11 U.S.C. §547(c)(1)

¹⁴ *In re Fuel Oil Supply & Terminaling, Inc.*, 837 F.2d 224, 228 (5th Cir. 1988).

¹⁵ *In re Cocolat*, 176 B.R. at 548, citing, *In re Jet Florida System, Inc.*, 841 F.2d 1082, 1084 (11th Cir.1988) and *In re Fuel Oil Supply & Terminaling, Inc.*, 837 F.2d at 228.

(2) the exchange of payment for new value must have been intended by the debtor and the creditor to be contemporaneous; and

(3) the exchange must have been in fact substantially contemporaneous.¹⁶

[A] party seeking to shelter a payment under the contemporaneous-exchange-for-new-value exception must do more than simply show that some new value was given the debtor; a party relying on the protection by this section must prove with *specificity* the measure of new value given the debtor in the exchange transaction he seeks to protect – and the challenged payment is protected *only* to the extent of the specific measure of new value shown.¹⁷

The parties have stipulated that after a new value analysis only \$345,286.56 of the payments are not protected by new value.¹⁸ The court has been given no other new value analysis.

Also, even “transactions that appear at first glance to be contemporaneous exchange[s] for new value will not be considered under subsection 547(c)(1)(A) absent a showing that the parties actually intended the exchange to be contemporaneous.”¹⁹ Placid has done nothing to show

¹⁶ *In re Arrow Air, Inc.*, 940 F.2d 1463, 1465 (11th Cir.1991).

¹⁷ *Id.* at 1466.

¹⁸ Trial Exhibit Jitney 3, B

¹⁹ Collier on Bankruptcy, ¶547.04[1][a], p. 547-50 (15th ed. 2004).

that the exchanges of payment for new value were intended to be contemporaneous.²⁰ Accordingly, Placid has not met its burden of proof.

C. Ordinary course of business

Placid contends that the transfers may not be avoided because they were made in the ordinary course of business pursuant to 11 U.S.C. §547(c)(2), which provides that a transfer may not be avoided

- (2) to the extent that such transfer was
 - (A) in the payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
 - (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
 - (C) made according to ordinary business terms; ...²¹

The creditor must prove each of the three elements under §547(c)(2).²² Whether or not a payment is made in the ordinary course of business and according to ordinary business terms is a factual determination.²³ No precise legal test exists for whether payments are in the ordinary course of

²⁰ Placid is basing its entire §547(c)(1) defense on language in the debtor's pre-trial memo which says that after the credit reduction the debtor "was effectively paying on a cash on delivery (COD) basis." (P. 20).

²¹ 11 U.S.C. §547(c)(2)

²² *In re Midway Airlines*, 69 F.3d 792, 798 (7th Cir. 1995).

²³ *In re Braniff Airways, Inc.*, 873 F.2d 805, 806 (5th Cir. 1989).

business.²⁴ However, while §547(g) places the burden of proof under §547(b) on the trustee, it also specifically places the burden under §547(c) on the transferee.

The Fifth Circuit has provided a test for the ordinary course of business defense.²⁵ Under the test, the creditor must prove both an objective and a subjective prong.

In sum, the creditor must show that as between it and the debtor, the debt was both incurred and paid in the ordinary course of their business dealings *and* that the transfer of the debtor's funds to the creditor was made in an arrangement that conforms with ordinary business terms – a determination that turns the focus away from the parties to the practices followed in the industry.²⁶

1. Ordinary Course of Business between the Parties (subjective inquiry)

Placid changed the credit terms twice during the preference period, on August 4, 1999, and on October 5, 1999. Before the August 4, 1999 term change, Placid and the debtor had the same credit terms for over two years.

Since January 21, 1997, the debtor's credit limit had been \$300,000. The terms of payment were twelve days from the invoice date, and payment

²⁴ *Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp.*, 158 F. 3d 312, 317 (5th Cir. 1998).

²⁵ *Gulf City Seafoods, Inc. v. Ludwig Shrimp Co., Inc.*, 296 F.3d 363 (5th Cir. 2002).

²⁶ *Id.* at 367.

was made by EFT. On August 4, 1999, however, Placid lowered the credit limit to \$125,000 and began requiring the debtor to pay by wire transfer. This was not the ordinary course of business between the parties.

Requiring payment by wire transfer rather than EFT is a major difference in dealings between the parties. The debtor's payments to Placid had been made by EFT for eight (8) years, since June of 1991. Placid's credit manager, James McKay, testified that the reason Placid made the debtor pay by wire transfer was that an EFT could be stopped by the debtor, but a wire transfer could not be.²⁷ Also, a wire transfer cannot be returned for insufficient funds. An August 3, 1999, file memo from Mr. McKay states,

... it was agreed they reduce Pump & Save's line to 125M and obtain wire transfers the same day that they reach 125M for their entire balance. This would be a better option than obtaining early EFT drafts when they reach 125M, as there is a possibility of the drafts being returned.²⁸

In determining whether payments during the preference period were made in the ordinary course of business between the parties, the court should

²⁷ Pleading 28 (Transcript), p. 63

²⁸ Placid Trial Exhibit 27.

examine whether the timing of the payments before and during the preference period had “some consistency.”²⁹

The debtor contends that as a result of lowering the credit limit and requiring payment by wire transfer the debtor had to make early payments. Placid introduced evidence showing that the debtor made payments early even before August 4, 1999. The average payment range from January 1999 through June 1999 was 5.05 days. From July 8, 1999, to August 4, 1999, the average time between invoice date and payment date was 7.32 days. After Placid lowered the credit limit on August 4, 1999, the average time between invoice date and payment date was only .86 days. It is obvious to the court that the changes made by Placid on August 4, 1999 had a big effect on the payment practices of the debtor.

After reviewing the payment ranges before and during the preference period, the court finds that the timing of the payments made before August 4, 1999 had “some consistency” with the payments before the preference period. The court, however, finds that the timing of the payments after August 4, 1999, are inconsistent with the ordinary course of business between the parties.

²⁹ *Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp.*, 158 F. 3d at 317.

On October 5, 1999, two months after the August 4, 1999 changes to the credit agreement, Placid lowered the debtor's credit limit to \$0. There is a notation on the Credit Authorization next to the credit rating that says "prepay." This was definitely not the ordinary course of business between the parties. The court has no record of payments made after October 4, 1999.

Mr. McKay, testified that Placid changed the terms of the credit agreement because of the debtor's financial condition.³⁰ Rita Patrick, a former employee of the debtor, testified that the debtor continued to do business with Placid because Placid was an important supplier to the debtor due to its low prices and convenient terminals.³¹ This court understands that Placid was just trying to reduce the risk that it would not get paid, but Placid's motive is not the issue.

The purpose of a transfer is not dispositive of the question whether it qualifies as an avoidable preference under section 547(b) because "it is the *effect* of the transaction, rather than the debtor's or creditor's *intent*, that is controlling." 4 *Collier on Bankruptcy* ¶ 547.01 (emphasis in original). The purpose of section 547(b) is to " 'facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.' " *Id.* (quoting H.R.Rep. No. 595, 95th Cong., 1st Sess. 177-78 (1977) (House Report), U.S.Code Cong. & Admin.News 6137-39 (1978)). The creditor's or debtor's " 'state of mind has

³⁰ Pleading 28 (Transcript), p. 29

³¹ Pleading 28 (Transcript), p. 75

nothing whatsoever to do with the policy of equality of distribution.”” *Id.* at ¶ 547.01 n. 12 (quoting House Report at 178); *see Matter of Hughes*, 704 F.2d 820, 822 (5th Cir.1983); *Barash v. Public Fin. Corp.*, 658 F.2d 504, 510 (7th Cir.1981).³²

The result of Placid reducing the debtor’s credit line and requiring wire transfers on August 4, 1999 was that the debtor had to pay earlier than usual in order to stay below its credit limit and continue doing business with Placid.

The court finds that the payments made after August 4, 1999 were not made in the ordinary course of business between the parties. As a result, Placid has not met its burden of proof under §547(c)(2), and the court does not need to reach the objective component of that section with respect to the payments made after August 4, 1999.

Placid cited *In re Brown Transport Truckload, Inc.*³³ for the proposition that because the credit agreement allowed it to change the credit limit and allowed early transfers, the transfers were within the ordinary course of business. Placid is essentially saying that because they could have changed the credit limit more frequently, it was in the ordinary course of

³² *In re T. b. Westex Foods, Inc.*, 950 F.2d 1187, 1195 (5th Cir. 1992).

³³ 161 B.R. 735 (Bankr.N.D.Ga. 1993).

business. Just because they were within their right under the contract does not make Placid's actions ordinary when compared with the history between the parties.³⁴

Brown involved fuel sales as does this case; however, the other facts are distinguishable from the case at bar. In *Brown*, the fuel company's ordinary practice was to adjust the credit limit frequently. In fact, it adjusted the credit limit 3 times in less than one year. In the case at bar, even though Placid frequently reviewed the debtor's financial information, Placid had not adjusted the credit limit in over two years. Then, it adjusted the credit limit twice within a couple of months. While Placid could have under its contract adjusted the credit limit more frequently, it did not in the ordinary course of its dealings with the debtor.

2. Ordinary Course of Business in the Industry (objective inquiry)

The court must still apply the objective component of §547(c)(2), the ordinary course of business in the industry, to the transfers made before the August 4, 1999 credit agreement change.

³⁴ Even late payments, payments beyond the terms of the contract, have been found to be ordinary between the parties as a result of their history of dealings. Courts look beyond the contract to the actual practice of the parties. See *Yurika Foods Corp. v. United Parcel Service*, 888 F.2d 42 (6th Cir. 1989).

The debtor stipulated at trial that the credit agreements between the parties were customary.³⁵

Because "ordinary business terms" sets an outer boundary to the parties' practices, the ultimate question is simply whether a particular arrangement is so out of line with what others do that it fails to be "according to ordinary business terms."³⁶

The court is satisfied with the testimony and report³⁷ of Donald Staley, expert witness for Placid, that the dealings between Placid and the debtor were ordinary in the industry. Accordingly, the court finds that the payments made before August 4, 1999 cannot be avoided as preferential because they were made in the ordinary course of business pursuant to 11 U.S.C. §547(c)(2).

III. Conclusion

In sum, the court finds that the payments made by the debtor on August 20, 1999, September 2, 1999, and September 27, 1999 cannot be avoided as preferential because they were not on account of an antecedent debt pursuant to 11 U.S.C. §547(b)(2). The court also finds that the payments made between July 14, 1999 and August 4, 1999 cannot be

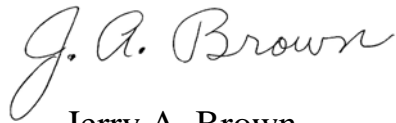
³⁵ Pleading 28 (Transcript), p. 83.

³⁶ *Gulf City Seafoods, Inc. v. Ludwig Shrimp Co., Inc.*, 296 at 369.

³⁷ Trial Exhibit Placid-Staley 1

avoided because they were made in the ordinary course of business between the parties pursuant to 11 U.S.C. §547(c)(2). The court further finds that the payments made by the debtor after August 4, 1999, with the exception of the payments made on August 20, 1999, September 2, 1999, and September 27, 1999, were preferential pursuant to 11 U.S.C. §547(b) and can be recovered by the plaintiff pursuant to 11 U.S.C. §550(a) to the extent that the new value defense pursuant to 11 U.S.C. §547(c)(4) does not apply as per the joint stipulation of the parties.³⁸ Accordingly, the court finds that the plaintiff is entitled to recover \$222,016.43 from the defendant. Judgment will be entered in accordance with this memorandum opinion.

New Orleans, Louisiana, March 14, 2005.

A handwritten signature in cursive script that reads "J. A. Brown".

Jerry A. Brown
U.S. Bankruptcy Judge

³⁸ Trial Exhibit Jitney 3